In the
Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH,

Petitioner,

v.

U.S. ARMY CORPS OF ENGINEERS;
JOHN W. PEABODY; and KEVIN J. WILSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a Jurisdictional Determination under the Clean Water Act, finding that Petitioner's property is subject to that Act's strictures, a "final agency action" subject to judicial review under the Administrative Procedure Act, where the Jurisdictional Determination: (1) affords the landowner a viable estoppel defense in a future enforcement action; (2) decides whether a CWA permit is necessary; and (3) subjects the landowner to elevated penalties?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Fairbanks North Star Borough (Borough) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals is published at 543 F.3d 586 (9th Cir. 2008) (Appendix (App.) A). The panel opinion of the court of appeals denying the Petition for Rehearing En Banc is not published and is included in Appendix C. The opinion of the district court granting the motion for judgment on the pleadings is not published and is included in Appendix B.

JURISDICTION

On May 18, 2007, the district court dismissed the Borough's complaint, holding that it lacked jurisdiction to review the Borough's challenge to a Jurisdictional Determination issued to the Borough by Respondent United States Army Corps of Engineers under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* On September 12, 2008, the Ninth Circuit Court of Appeals affirmed the judgment of the district court. That court denied the Borough's Petition for Rehearing en Banc on November 20, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

The Administrative Procedure Act (APA) provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

The Corps's administrative regulations pertaining to JDs provide in pertinent part:

> The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory

> exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action.

33 C.F.R. § 320.1(a)(6).

> The terms and definitions contained in 33 CFR Parts 320 through 330 are applicable to this part. In addition, the following terms are defined for the purposes of this part:
>
> . . . .
>
> Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.
>
> Basis of Jurisdictional Determination is a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks; indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is . . . part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.

> Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include determinations that a particular activity requires a DA permit.

33 C.F.R. § 331.2.

> General. The administrative appeal process for approved JDs, permit denials, and declined permits is a one level appeal, normally to the division engineer. The appeal process will normally be conducted by the [Review Officer (RO)]. The RO will

> document the appeal process, and assist the division engineer in making a decision on the merits of the appeal. The division engineer may participate in the appeal process as the division engineer deems appropriate. The division engineer will make the decision on the merits of the appeal, and provide any instructions, as appropriate, to the district engineer.

33 C.F.R. § 331.7(a).

> The final decision of the division engineer on the merits of the appeal will conclude the administrative appeal process, and this decision will be filed in the administrative record for the project.

33 C.F.R. § 331.9(c).

INTRODUCTION

This case concerns the exceptionally important matter of the meaning of "final agency action" under the APA, and the meaning of this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). Specifically, can a landowner seek judicial review of a formal agency decision that authoritatively determines that the landowner's property is subject to the strictures of the CWA or must the landowner wait until some undefined point in the future to obtain judicial review of that agency decision. The regulations of the United States Army Corps of Engineers provide landowners with an administrative process whereby the Corps will determine if their property is subject to the CWA. This process, used by thousands of landowners across the

country every year, produces what is called a "Jurisdictional Determination." A Jurisdictional Determination finding jurisdiction puts the landowner on notice that, prior to commencing any earthmoving or fill activity, the landowner must first obtain a permit from the Corps.

Here, the Borough, wishing to build playgrounds and an athletic field, requested a Jurisdictional Determination from the Corps. The agency responded with a Jurisdictional Determination finding that the site of the proposed development contained regulable wetlands under the CWA. The Borough disagreed with the Corps's analysis and filed suit under the APA to challenge the Jurisdictional Determination. The district court dismissed the Borough's complaint. The Ninth Circuit affirmed, concluding that the Jurisdictional Determination does not constitute final agency action because it does not change the legal rights or obligations of a party.

The Ninth Circuit's finality analysis is seriously flawed, and has the immediate result of forcing landowners throughout the West to endure the heavy burden of the CWA permitting process, even where ultimately the Corps may have no jurisdiction. The Ninth Circuit's decision creates this regulatory nightmare unnecessarily: a Jurisdictional Determination *does* constitute final agency action because it *does* change the rights and obligations of the party, most importantly by affording a landowner with an estoppel defense to avoid legal liability in any subsequent enforcement action. The Ninth Circuit's decision also conflicts with the line of cases following *Leedom v. Kyne*, 358 U.S. 184 (1958), which holds that

judicial review is always immediately available to prevent gross abuses of agency power.

For these reasons, more fully set forth below, the Borough respectfully requests that this Court grant the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Fairbanks North Star Borough, a political subdivision of the State of Alaska, holds title to approximately 115,000 acres of land, some of which it develops, markets, and sells. The property at issue in this case comprises 2.1 acres which the Borough wishes to develop into playgrounds, athletic fields, restrooms, concessions, and related structures. On October 26, 2005, the Borough requested a Jurisdictional Determination from the Corps. Administrative Record (Admin. R.) at 68. On November 3, 2005, the Corps issued a positive preliminary Jurisdictional Determination. *Id.* at 62. The Borough subsequently requested a final determination. *Id.* at 60. On December 13, 2005, the Corps issued a positive final Jurisdictional Determination, finding that the Borough's entire parcel contains waters of the United States. *See id.* at 51. The appeal held that, notwithstanding the presence of permafrost on the Borough's property (meaning that the ground is frozen for most days of the year), the property contains regulable *wetlands*. On February 8, 2006, the Borough filed an administrative appeal, contending that the Jurisdictional Determination was inconsistent with the 1987 Wetlands Manual. *See id.* at 11. On May 26, 2006, the Corps's then-appellate officer, Brigadier General John W. Peabody, denied the appeal and upheld the Corps's final Jurisdictional Determination finding jurisdiction. *Id.* at 4.

The Borough then filed a complaint in the District of Alaska under the APA, seeking declaratory and injunctive relief. The Borough's principal claim was that the Corps had used an incorrect standard for determining whether the Borough's property contained jurisdictional wetlands. Specifically, the Borough contended that the Corps had used a metric for establishing the Fairbanks-area wetlands growing season that is inappropriate for extremely cold climates. Moreover, the Borough contended that the growing season standard used by the Corps for the Borough's Jurisdictional Determination conflicted with the Corps's authoritative 1987 Wetlands Manual.[1]

The District Court Decision

Ruling on the Corps's motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, the district court held that it lacked jurisdiction to review the Jurisdictional Determination. Specifically, the court held that (1) the Jurisdictional Determination did not constitute final agency action under the APA, App. at B-6, (2) the CWA affirmatively precluded review of the Jurisdictional Determination, *id.* at B-6–B-7, and (3) the Jurisdictional Determination was not ripe for review, *id.* at B-7–B-8.

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[1] The Borough did not object to the entry of judgment on its Second Claim for Relief, which contended that the Corps's promulgation of the "Alaska Rule" (Special Public Notice 2003-05), a specialized rule applicable only to Alaska for identifying wetlands, was illegal because it had not been subjected to the APA's notice-and-comment procedures. The Borough conceded that the Corps's revocation of the Alaska Rule mooted that claim. *See* App. at B-3 n.4.

The Ninth Circuit's Decision

The Borough appealed the dismissal to the Ninth Circuit, which affirmed, reaching only the issue of final agency action. Although agreeing with the Borough that, under this Court's *Bennett* decision, the Jurisdictional Determination represents the consummation of the Corps's decisionmaking process with respect to CWA jurisdiction over the Borough's property, the Ninth Circuit found that review must be withheld, because the Jurisdictional Determination purportedly does not affect the Borough's rights or obligations. *See Fairbanks N. Star Borough*, 543 F.3d at 593 (App. at A-12). In reaching this conclusion, the court reasoned that any legal obligation attaching to the Borough derives from the CWA, not from the Jurisdictional Determination, and that the Borough is not denied judicial review entirely, because it can raise the jurisdictional issue in a permit contest or enforcement proceeding. *See id.* at 593-95 (App. at A-12–A-15).

The Ninth Circuit rejected each of the Borough's arguments as to why the Jurisdictional Determination affects the Borough's rights and obligations. The court dismissed the Borough's argument that the Jurisdictional Determination may serve as the basis for an augmented penalty in a future enforcement proceeding, on the grounds that the "jurisdictional determination has no more legal effect on Fairbanks' ability eventually to assert a good faith defense than would, for example, a report by a private wetlands consultant informing Fairbanks that its property contained wetlands." *Id.* at 595 (App. at A-17). The court rejected the Borough's contention that the Jurisdictional Determination requires the Borough to

seek a CWA permit (which it otherwise would not apply for), on the grounds that "Fairbanks' legal obligations—including any obligation to pursue a Section 404 dredge and fill material discharge permit—have always arisen solely on account of the CWA," not from the Jurisdictional Determination. *Id.* at 596 (App. at A-18). Lastly, the court found no merit to the Borough's argument that, had the Corps issued a Jurisdictional Determination finding no CWA jurisdiction, the Jurisdictional Determination would have provided the Borough with a good estoppel defense in a future enforcement action. Although such a Jurisdictional Determination would have legal consequences, *see id.* at 596 n.12 (App. at A-18–A-19), the court reasoned that, because the Borough's Jurisdictional Determination found jurisdiction, and thus the Borough would have no need or opportunity to present an estoppel defense, the Borough's Jurisdictional Determination does not have legal consequences.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE PETITION TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER A LANDOWNER MAY SEEK JUDICIAL REVIEW OF A JURISDICTIONAL DETERMINATION

The Ninth Circuit's decision forces landowners throughout the western United States who believe that their property is not subject to the CWA (notwithstanding a Jurisdictional Determination to the contrary) into a dilemma: (1) abandon their

development plans; (2) agree to participate in the CWA permitting process, a process that even the panel decision conceded to be arduous and expensive, *Fairbanks N. Star Borough*, 543 F.3d at 596 n.11 (App. at A-17); or (3) proceed in spite of the Jurisdictional Determination, and incur the risk of significant penalties (without appealing the determination). The Ninth Circuit's conclusion that a Jurisdictional Determination does not have legal consequences, *see id.* at 593 (App. at A-12), raises an exceptionally important issue of law having far-reaching effect on land use and development throughout the western United States. Moreover, its conclusion conflicts with the settled rule that permit decisions are judicially reviewable.

The Ninth Circuit acknowledged that a Jurisdictional Determination finding no jurisdiction may well have legal consequences, yet strangely concluded that a Jurisdictional Determination finding jurisdiction does not. *See id.* at 596-97 (App. at A-18–A-19). But if (1) a landowner is *entitled under law* to a Jurisdictional Determination finding no jurisdiction (because his property does not contain jurisdictional wetlands), and (2) the Corps *wrongfully* issues a Jurisdictional Determination finding jurisdiction, then (3) the landowner should have an opportunity to contest the Corps's determination in court. *Cf. Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948) ("[A]dministrative orders are not reviewable unless and until they impose an obligation, *deny a right* or fix some legal relationship as a consummation of the administrative process.") (emphasis added).

If the Ninth Circuit's reasoning were applied to a CWA permit denial, then such a denial would not be judicially reviewable. Yet a permit denial *is* reviewable precisely because, *if* the permit is granted, *then* the landowner has a legal right to fill wetlands free from liability. As shown below, neither the Corps nor the courts hold that CWA permit denials are beyond judicial review. So it should be with Jurisdictional Determinations. *See* Ian Sutton & Steven F. Hill, *Reevaluating Judicial Review and the Corps' Jurisdictional Determinations*, 22 Nat. Resources & Env't 29 (Sum. 2007).

The Jurisdictional Determination process is critically important for the regulated public. As of 2003 (the most recent year for which statistics are available), the Corps processed over 74,000 Jurisdictional Determinations.[2] But the process's value is substantially undercut if landowners cannot seek judicial review of Jurisdictional Determinations. Perhaps for that reason, the Corps, in promulgating regulations governing the Jurisdictional Determination administrative appeal process, "decided not to address . . . when a JD should be considered a final agency action." 65 Fed. Reg. 16,486, 16,488 (Mar. 28, 2000). If the Corps will not speak, this Court should. The Ninth Circuit's decision to withhold judicial review converts the Jurisdictional Determination process into a grand waste of time, money, and effort. Review in this Court is merited to decide the important question of reviewability of Jurisdictional Determinations.

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[2] *See* http://www.usace.army.mil/CECW/Documents/cecwo/reg/2003webcharts.pdf (last visited Feb. 6, 2009).

A. Legal Consequences Flow from a Jurisdictional Determination

An agency action is final if it marks the consummation of the decisionmaking process and either determines rights or obligations, or is such that legal consequences flow from it. *Bennett*, 520 U.S. at 177-78. A Jurisdictional Determination both marks the culmination of the Corps's decisionmaking process regarding its CWA authority, and produces legal consequences. Whether a jurisdictional determination meets the second *Bennett* requirement for APA finality is an important question that can only be resolved by this Court.

Contrary to the decision below, this Court should grant certiorari to hold that the legal consequences prong is met because the Jurisdictional Determination process affords legal immunity to landowners through an estoppel defense. *See United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987) (noting that an estoppel defense "applies when an official tells the defendant that certain conduct is legal and the defendant believes the official") (internal quotation marks omitted). *Cf. Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) ("In some circumstances, if the language of the document is such that private parties can rely on it as a norm or *safe harbor* by which to shape their actions, it can be binding as a practical matter.") (emphasis added; internal quotation marks omitted).

Moreover, this Court should clarify that a Jurisdictional Determination directly and immediately alters a landowner's course of conduct, because it represents the authoritative determination of the responsible agency that the landowner is subject to

CWA strictures and thus must seek a permit to continue with his project.[3] *See* 60 Fed. Reg. 37,280, 37,282 (July 19, 1995) ("[A] jurisdictional determination . . . establishes whether a particular area is subject to regulatory authority under section 404 of the Clean Water Act . . . ."). *Cf. Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) ("[A]n agency action may be final if it has a direct and immediate . . . effect on the day-to-day business of the subject party.") (internal quotation marks omitted).

Finally, this Court should resolve this issue because an unreviewed, positive Jurisdictional Determination substantially increases the likelihood that any civil fine assessed against the landowner will be greater than otherwise would be the case. *See* 33 U.S.C. § 1319(d) (noting "good faith" as one of the factors). *Cf. United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965-66 (S.D. Fla. 1989) (filling of wetlands in violation of Corps's cease-and-desist letter justifies substantial civil penalty); *Hanson v. United States*, 710 F. Supp. 1105, 1109 (E.D. Tex. 1989) (upholding substantial administrative penalty owing in part to violation of three cease-and-desist orders);

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[3] The CWA permitting process can be long and arduous. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74-76 (2002)."); *Fairbanks N. Star Borough*, 543 F.3d at 596 n.11 (App. at A-17) ("We appreciate that navigating the CWA permitting process is no small task.").

United States v. Ciampitti, 669 F. Supp. 684, 699 (D.N.J. 1987) (substantial civil penalty justified based upon defendant's knowing disregard of CWA). *Cf.* 33 U.S.C. § 1319(d) (authorizing civil penalties of $25,000 per day per violation).

B. The Ninth Circuit's Decision Conflicts with the Settled Rule That Agency Decisions on Permit Applications Are Subject to Judicial Review

The Ninth Circuit agreed with the Borough that *one* outcome of the Jurisdictional Determination process—namely, a Jurisdictional Determination finding no jurisdiction—would likely be reviewable because it would provide the landowner with an estoppel defense in a subsequent enforcement action.

> Fairbanks may be correct that an official Corps statement that a property is *not* a jurisdictional wetland subject to the CWA's permitting requirements could be the basis for an estoppel defense. When an authorized government official tells the defendant that a course of action is legal and the defendant reasonably relies to its detriment on that erroneous representation, then fairness and due process may prohibit the state from punishing the defendant for that unlawful conduct. Courts have recognized that finality can result if the language of the document is such that private parties can rely on it as a safe harbor by which to shape their actions.

Fairbanks N. Star Borough, 543 F.3d at 596 n.12 (App. at A-18–A-19) (citations, quotation marks, and ellipses

omitted). Yet in a wholly inconsistent application of the law, the Ninth Circuit labeled as a "non sequitur" the Borough's assertion that a Jurisdictional Determination finding jurisdiction is also judicially reviewable, reasoning that the assertion was based on "the dubious premise that if an agency's decisionmaking process has multiple outcomes and *any* of these outcomes is judicially reviewable, then *all* of them must be judicially reviewable." *See id.* at 596-97 (App. at A-19).

On this point, the holding of the lower court's decision conflicts with the settled rule that CWA permit decisions are judicially reviewable. For the Ninth Circuit's decision takes no account of the nearly perfect analogy between Jurisdictional Determinations and Corps permit decisions, which are judicially reviewable *regardless* of their outcome. *See, e.g., Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272 (D.C. Cir. 2005) (issuance of CWA nationwide permits subject to judicial review); *Michigan Peat, a Div. of Bay-Houston Towing Co. v. EPA*, 175 F.3d 422 (6th Cir. 1999) (permit grant subject to judicial review); *Child v. United States*, 851 F. Supp. 1527, 1533 n.11 (D. Utah 1994) (permit denial subject to judicial review); *Sierra Club v. U.S. Army Corps of Eng'rs*, 935 F. Supp. 1556, 1565 n.10 (S.D. Ala. 1996) (permit grant subject to judicial review). The Corps below advanced the position that permit decisions are reviewable, *see* Corps Answering Brief at 14 ("[The Borough] can apply to the Corps for a permit under Section 404. If its application is denied, the Borough can appeal administratively and then seek judicial review under the APA."), as did the Ninth Circuit's decision. *See Fairbanks N. Star Borough*, 543 F.3d at 594-95 (App. at A-14–A-15) ("It is settled law

that the federal courts have the final say on the scope of the CWA. In exercising that authority, we would not give the government's position that CWA regulatory jurisdiction exists any particular deference simply because the Corps' views on the matter were formulated in the context of an approved jurisdictional determination rather than, for example, a permit application or enforcement proceeding.") (footnote omitted).

Just as a disappointed permittee can challenge in court the Corps's denial of his permit application, so too should the Jurisdictional Determination applicant be able to challenge in court the Corps's decision that his property is subject to the CWA. In the former instance, the permit denial precludes the landowner from legally discharging dredge-and-fill material into the waters of the United States, yet the legal rights and obligations of the landowner remain the same after the permit denial as before the permit was applied for. Nevertheless, both the Corps and the courts acknowledge that a permit denial is judicially reviewable. In the latter instance, the Jurisdictional Determination finding jurisdiction precludes the landowner from using the Jurisdictional Determination as the basis for an estoppel defense and proceeding with his development project without having to obtain a CWA permit. Just as in the permit context, where the particular outcome of the permit proceeding—grant or denial—does not affect whether that outcome is judicially reviewable, the same ought to be true with Jurisdictional Determinations.

The essential point is this: if an administrative proceeding is capable of producing an outcome that would constitute final agency action, and if a

participant in the concluded proceeding contends that, under the law, he has *a legal right* to a particular outcome that *would* constitute a final agency action, then the agency's denial of that outcome is itself a final agency action susceptible to judicial review. The logic of a contrary position would render every permit denial, in every circumstance, unreviewable. That has never been the law. *See, e.g.*, *Child*, 851 F. Supp. at 1533 n.11; *Leslie Salt Co. v. United States*, 789 F. Supp. 1030, 1033 (N.D. Cal. 1991) (decision on permit application constitutes final agency action).

The Ninth Circuit's adoption of the contrary position therefore raises an issue of exceptional importance meriting the review of this Court.

II

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION CONFLICTS WITH *LEEDOM v. KYNE* AND DECISIONS OF OTHER COURTS OF APPEALS

The Borough argued below that, even if a Jurisdictional Determination would normally not be subject to judicial review, any such bar should be removed given the magnitude of regulatory overreach produced by the Corps's theory justifying regulation of the Borough's property. The Ninth Circuit rejected *sub silentio* the argument. In doing so, the lower court's ruling conflicts with this Court's decision in *Leedom v. Kyne*, 358 U.S. 184, as well as the decisions of the courts of appeals in *Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993), and *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement, Department of Interior*, 20 F.3d 1418 (6th Cir. 1994).

Leedom requires that federal courts hear challenges to an agency's jurisdiction when judicial review is necessary to protect a right conferred by Congress. *See* 358 U.S. at 191. The case concerned the National Labor Relations Board's decision to include professional with nonprofessional workers into one collective bargaining unit without allowing the professional workers to vote upon the action, as required by Section 9(b)(1) of the National Labor Relations Act. The Supreme Court had previously held that Board orders do not constitute "final agency action," and that the legality of Board orders can only be reviewed through the Act's express provision—Section 10(c)—for challenging or reviewing enforcement orders or unfair labor practices. *See id.* at 187. Nevertheless, *Leedom* determined that the Board's action was immediately reviewable.

> Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

Id. at 189. The Court reasoned that in such circumstances, the inference would be strong that Congress intended the "general jurisdiction of [the federal] courts to control." *Id.* at 190.

The Corps's action in this case also merits review under the *Leedom* doctrine. The *Leedom* doctrine permits the exercise of general federal jurisdiction—here under the APA—to allow judicial review of agency action that implicates the fundamental right to use and enjoy property. As noted

above, *see, supra*, at 7-8, the Corps's theory for jurisdiction over the Borough's property—that permafrost can constitute regulable wetlands—would justify federal regulatory control over much private property in Alaska. Both the Seventh and Sixth Circuits have recognized the applicability of the *Leedom* doctrine in precisely this context of "[a] complete[] overexten[sion of] the[agency's] authority." *Rueth*, 13 F.3d at 231. *See S. Ohio Coal Co.*, 20 F.3d at 1427.

For example, in *Rueth*, the Seventh Circuit declined to review a CWA compliance order asserting jurisdiction over the plaintiff's wetlands because the CWA, as then interpreted, extended CWA authority to all wetlands with even the most tenuous of connections to interstate waters. *See Rueth*, 13 F.3d at 231. But that rationale can no longer stand given the significant narrowing of the Corps's authority following subsequent decisions of this Court. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (rejecting migratory bird rule); *Rapanos v. United States*, 547 U.S. 715 (2006) (rejecting hydrological connection rule). Similarly here, the Corps's assertion that permafrost can constitute regulable wetlands constitutes such a marked expansion of CWA authority as to justify this Court's review of the Jurisdictional Determination under *Rueth* and *Leedom*.[4]

Thus, the Ninth Circuit's *sub silentio* determination that the *Leedom* doctrine does not apply

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[4] The Sixth Circuit in *Southern Ohio Coal Co.* found the *Leedom* doctrine inapplicable based upon its conclusion that the CWA's grant of enforcement authority presupposes a correlative grant of investigatory authority. *See* 20 F.3d at 1427-28.

therefore creates a conflict with the case law of this Court and of other courts of appeals, meriting certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: February, 2009.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAIRBANKS NORTH STAR BOROUGH, *Plaintiff-Appellant*, v. U.S. ARMY CORPS OF ENGINEERS; JOHN W. PEABODY; KEVIN J. WILSON, *Defendants-Appellees.*	No. 07-35545 D.C. No. CV-6-0026-F-RRB OPINION

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Argued and Submitted
August 4, 2008—Anchorage, Alaska

Filed September 12, 2008

Before: Dorothy W. Nelson, A. Wallace Tashima and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

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OPINION

FISHER, Circuit Judge:

The Clean Water Act ("CWA") makes it unlawful to discharge dredged and fill material into the waters of the United States except in accord with a permitting regime jointly administered by the Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA"). *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). Fairbanks North Star Borough ("Fairbanks") seeks judicial review of a Corps' "approved jurisdictional determination," which is a written, formal statement of the agency's view that Fairbanks' property contained waters of the United States and would be subject to regulation under the CWA. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's dismissal on the pleadings for lack of jurisdiction. The Corps' approved jurisdictional determination is not

final agency action within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704.

BACKGROUND[1]

"The burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion). Under the CWA, "any discharge of dredged or fill materials into . . . 'waters of the United States'[ ] is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to" Section 404 of the CWA, which is codified at 33 U.S.C. § 1344. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1391 (9th Cir. 1995); *see also Riverside Bayview*, 474 U.S. at 123; *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 646 (9th Cir. 2007). "The Corps has issued regulations defining the term 'waters of the United States,'" *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 163 (2001), to include most wetlands adjacent to waters of the United States that are not themselves wetlands, *see* 33 C.F.R. § 328.3(a)(7).

Fairbanks wishes to develop a 2.1 acre tract of property for its residents' recreational use. It intends to build "playgrounds, athletic fields, concession stands, restrooms, storage buildings, road[s], and parking lots," the construction of which will "include the placement of fill material." In October 2005,

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[1] On review of a judgment on the pleadings, we "accept all material allegations in the complaint as true and construe them in the light most favorable to [the non-moving party]." *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir. 2004) (internal quotation marks omitted and alterations in original).

Fairbanks wrote to the Corps to "ask[ ] for [its] review and determination" that it could place fill material on its property without further ado. It asked the Corps to "provide a detailed, scaled drawing showing the . . . wetlands in relation to the lot boundaries." The Corps thereafter issued a "preliminary" jurisdictional determination finding that Fairbanks' entire parcel contained wetlands. Fairbanks then requested that the Corps provide an "approved" jurisdictional determination. In December 2005, the Corps obliged Fairbanks and replied:

> Based on our review of the information you furnished and available to our office, we have determined that the entire parcel described above contains waters of the United States . . . under our regulatory jurisdiction . . . . This approved jurisdictional determination is valid for a period of five (5) years . . . unless new information supporting a revision is provided to this office . . . .

The Corps' letter went on to remind Fairbanks that "Section 404 of the Clean Water Act requires that a[ ] permit be obtained for the placement or discharge of dredged and/or fill material into waters of the U.S., including wetlands, prior to conducting the work." Fairbanks took a timely administrative appeal of the approved jurisdictional determination, which the Corps found to be without merit in May 2006. Fairbanks has not since applied for a Section 404 permit. Nor has the Corps initiated any pre-enforcement or enforcement action.

In August 2006, Fairbanks brought this suit to set aside the Corps' approved jurisdictional determination. According to Fairbanks, the Corps acted unlawfully in

asserting that its property was subject to CWA regulatory jurisdiction. Fairbanks contended that its property could not possibly be a wetland because it is "underlain by shallow permafrost at a depth of 20 inches" that does not "exceed zero degrees Celsius at any point during the calendar year." A Corps regulation, which is not challenged here, provides that:

> The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

33 C.F.R. § 328.3(b). To identify wetlands under this regulation, the Corps uses its 1987 Wetlands Delineation Manual ("Manual"). *See* Energy and Water Development Appropriations Act, Pub. L. No. 102-377, 106 Stat. 1315, 1324 (1992); *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003).

The Manual explains that wetlands have the three "general diagnostic environmental characteristics" of vegetation, soil and hydrology. Manual ¶ 26(b). Generally, "evidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination." *Id.* ¶ 26(c). Fairbanks alleged that its property lacks wetlands hydrology, because it is not "periodically inundated" and does not have "saturated soils during the growing season." *Id.* ¶ 46. The Manual defines "growing season" as "[t]he portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero (5° C)" and notes that "[f]or

ease of determination this period can be approximated by the number of frost-free days." *Id.* at App. A. Fairbanks asserted that the Corps' jurisdictional determination improperly relied on a special definition of "growing season," which Fairbanks calls the "Alaska Rule," inconsistent with the Manual's definition. The Alaska Rule states that the frost-free period based on a "28 degree air temperature" best fits the "observed growing season in most parts of [Alaska]." *See* Army Corps of Engineers, Alaska District, Special Public Notice 03-05 (July 25, 2003). By using the Alaska Rule, Fairbanks claimed, the Corps could establish a growing season even when a property is underlain by shallow permafrost, and never has a subsurface soil temperature higher than biologic zero.[2] Consequently, the Corps' finding that Fairbanks' property was a wetland subject to CWA regulatory jurisdiction was erroneous.

The district court granted the Corps' motion for judgment on the pleadings, concluding that the approved jurisdictional determination did not constitute final agency action under the APA, that Fairbanks' challenge was unripe and that the CWA statutorily precluded judicial review. Fairbanks timely appealed.

STANDARD OF REVIEW

"We review a judgment dismissing a case on the pleadings de novo." *Dunlap v. Credit Prot. Ass'n, L.P.*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (per curiam).

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[2] Fairbanks concedes that the Corps' rescission of the Alaska Rule in March 2006 moots its claim that the Alaska Rule was promulgated without compliance with the APA's notice-and-comment procedures and does not challenge the district court's entry of judgment as to that claim.

"A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). "We review de novo the district court's determination that it lacked subject matter jurisdiction. We therefore do not defer to the agency's position on whether agency action is final." *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 979 n.1 (9th Cir. 2006) (internal citations omitted).

DISCUSSION

[1] As a matter of first impression, we hold that the Corps' issuance of an approved jurisdictional determination finding that Fairbanks' property contained waters of the United States did not constitute final agency action under the APA for purposes of judicial review.[3] "As a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted). The approved jurisdictional determination represented the Corps' definitive

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[3] This question has not been addressed by any published decision of the courts of appeals. *See Greater Gulfport Prop., LLC v. U.S. Army Corps of Eng'rs*, 194 F. App'x 250 (5th Cir. 2006) (unpublished) (holding that district court lacked jurisdiction to review Corps' approved jurisdictional determination); *Comm'rs of Pub. Works v. United States*, 30 F.3d 129 (4th Cir. 1994) (unpublished) (same).

administrative position that Fairbanks' property contained wetlands. But, as we shall explain, it did not " 'impose an obligation, deny a right, or fix some legal relationship.'" *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Because finality is a jurisdictional requirement to obtaining judicial review under the APA, the district court correctly dismissed Fairbanks' action. *See Or. Natural Desert Ass'n*, 465 F.3d at 982. We do not reach the issues of ripeness and statutory preclusion of judicial review.

I.

We agree with Fairbanks that an approved jurisdictional determination upheld in the Corps' administrative appeal process "mark[s] the consummation of the agency's decisionmaking process" for determining whether the Corps conceives a property as subject to CWA regulatory jurisdiction. There is no question that the Corps has asserted its ultimate administrative position regarding the presence of wetlands on Fairbanks' property "on the factual circumstances upon which the [determination is] predicated[.]" *See Alaska Dep't of Envtl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) ("*Alaska I*"); *see also Alaska Dep't of Envtl. Conservation v. EPA*, 298 F.3d 814, 818 (9th Cir. 2002), *aff'd* 540 U.S. 461, 483 (2004) ("*Alaska II*"). The approved jurisdictional determination states on its face that it "is valid for a period of five (5) years" and that the Corps' position would change only if "new

information supporting a revision is provided."[4] It is "devoid of any suggestion that it might be subject to subsequent revision" or "further agency consideration or possible modification." *See City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001) (quoting *Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990), and *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986)).

[2] By regulation, the Corps has established a formal procedure for "[a]ffected part[ies]" to solicit its official position about the scope of CWA regulatory jurisdiction. *See* 33 C.F.R. § 331.2. A jurisdictional determination is a "written Corps determination that a wetland . . . is subject to regulatory jurisdiction under [the CWA]." *Id.*; *see also* Jurisdictional Determinations, Corps Regulatory Guidance Letter 08-02, at 1 (June 26, 2008) ("An approved [jurisdictional determination] is an official Corps determination that jurisdictional [waters under the CWA] are either present or absent on a particular site."). After the district engineer's approved jurisdictional determination has been upheld by the division engineer, no further administrative appeal is

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[4] *Alaska I* forecloses the Corps' contention that an approved jurisdictional determination cannot satisfy *Bennett*'s first prong because the Corps might alter its position if the physical condition of Fairbanks' property changed. We had no difficulty there regarding the EPA's findings as its "last word" about the contested issue because the agency's position was "unalterable": it "would change only if the circumstances surrounding the [generator's construction] changed." *Alaska I*, 244 F.3d at 750; *see also Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002) ("If the possibility . . . of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final . . . .").

possible. *See* 33 C.F.R. § 331.9.[5] At that point, the approved jurisdictional determination is deemed to be "final Corps agency action" and a "final Corps decision" for administrative purposes. *Id.* § 320.1(a)(2), (a)(6) (emphasis added).[6] The regulations thus delimit the stopping point of the Corps' decisionmaking process for the issuance and review of jurisdictional determinations. An approved jurisdictional determination upheld on administrative appeal is the agency's "last word" on whether it views the property as a wetland subject to regulation under the CWA. *See Sierra Club v. U.S. NRC*, 825 F.2d 1356, 1362 (9th Cir.

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[5] With limited exceptions, the Corps' district engineers are authorized to "issue formal determinations concerning the applicability of the Clean Water Act . . . to . . . tracts of land . . . ." 33 C.F.R. § 320.1(a)(6); *but cf. id.* § 325.9. The district engineer's jurisdictional determination is subject to administrative appeal. *Id.* § 320.1(a)(2). In determining the appeal, the reviewing officer is to "conduct an independent review of the administrative record to address the reasons for the appeal cited by" the appellant. *Id.* § 331.3(b)(2). The reviewing officer must render a decision within 12 months of the filing of a request for appeal, *id.* § 331.8, "document his decision on the merits of the appeal in writing," *id.* § 331.9(b), and file it "in the administrative record for the project," thereby concluding the administrative appeal process, *id.* § 331.9(c).

[6] An agency's characterization of its own action as final is not "determinative" of our own finality analysis under the APA, *Blincoe v. FAA*, 37 F.3d 462, 464 (9th Cir. 1994) (per curiam), though it does "provide [ ] an indication of the nature of the [agency's] action," *City of San Diego*, 242 F.3d at 1101 n.6. The Corps has expressly declined to address "in . . . rule-making when a [jurisdictional determination] should be considered a final agency action" for purposes of judicial review. *See* Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16,486, 16,488 (Mar. 28, 2000).

1987). No further agency decisionmaking on that issue can be expected, a clear indication that the first prong of the *Bennett* finality test is satisfied. *See id.*

The Corps argues that an approved jurisdictional determination merely helps parties "determine where they stand on potential permitting issues" and "necessarily entails the possibility of further administrative proceedings," like permit applications. As such, the determination is "only [a] step [ ] leading to an agency decision, rather than the final action itself." *See Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999). Fairbanks correctly responds that this argument "conflate[s] one . . . decision with a future yet distinct administrative process." The Corps' regulations throughout treat jurisdictional determinations and permitting decisions as discrete agency actions.[7] Notably, jurisdictional determinations "do not include determinations that a particular activity requires a . . . permit." 33 C.F.R. § 331.2. The Corps' reliance on *City of San Diego* is misplaced in view of the agency's provision of a formal procedure for acquiring its settled views about the scope of CWA jurisdiction outside of and apart from the permitting process. *Cf. City of San Diego*, 242 F.3d at 1101 (reasoning that letter did not mark consummation of decisionmaking process because it was only "upon completion of the permit appeal

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[7] *See, e.g.*, 33 C.F.R. § 331.2 (identifying approved jurisdictional determinations, permit denials and declined permits as categories of "appealable action[s]"); *id.* § 331.3(a)(1) (allowing division engineer to delegate authority when reviewing jurisdictional determinations, but not permit decisions); *see also* Corps Regulatory Guidance Letter 08-02, at 2-3 (explaining that approved jurisdictional determination need not be secured before initiating permitting process).

process" that agency would decide applicability of statute). That Fairbanks might later decide to initiate some *other* Corps process after obtaining the approved jurisdictional determination does not detract from the definiteness of the determination itself.

[3] An approved jurisdictional determination announces the Corps' considered, definite and firm position about the presence of jurisdictional wetlands on Fairbanks' property at the time it is rendered. Accordingly, we conclude that it marks the consummation of the agency's decisionmaking process as to that issue.

II.

[4] Although Fairbanks is correct that the first *Bennett* requirement is satisfied, the second is not. We hold that the Corps' approved jurisdictional determination finding that Fairbanks' property contained wetlands subject to CWA regulatory jurisdiction is not an "action . . . by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178; *see also Or. Natural Desert Ass'n*, 465 F.3d at 987 (examining "whether [challenged action] has any legal effect that would qualify it as a final agency action under *Bennett*'s second finality requirement"). From this it follows that judicial review under the APA is unavailable.

[5] Fairbanks' rights and obligations remain unchanged by the approved jurisdictional determination. It does not itself command Fairbanks to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of "immediate compliance" nor of defiance. *See FTC v.*

Standard Oil Co., 449 U.S. 232, 239-40 (1980). Up to the present, the Corps has "expresse[d] its view of what the law requires" of Fairbanks without altering or otherwise fixing its legal relationship. *See AT & T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). This expression of views lacks the "status of law or comparable legal force." *See Ukiah Valley Med. Ctr.*, 911 F.2d at 264.[8] In any later enforcement action, Fairbanks would face liability only for noncompliance with the CWA's underlying statutory commands, not for disagreement with the Corps' jurisdictional determination. *See* 33 U.S.C. § 1319(b)-(c), (g) (providing criminal, civil and administrative penalties for violation of the CWA, but not referring to approved jurisdictional determinations); *cf. Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1255-57 (11th Cir. 2003) (reasoning that Clean Air Act compliance orders have status of law because statute "undeniably authorizes[s] . . . penalties based solely upon noncompliance" with them).

[6] At bottom, Fairbanks has an obligation to comply with the CWA. If its property contains waters of the United States, then the CWA requires Fairbanks to obtain a Section 404 discharge permit; if its property

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[8] *Cf., e.g., Alaska II*, 540 U.S. at 481 n.10 ("[T]he *stop-construction order* imposed 'new legal obligations' . . . .") (emphasis added); *Pub. Util. Dist. No. 1 of Snohomish County v. Bonneville Power Admin.*, 506 F.3d 1145, 1152 (9th Cir.2007) ("[T]hey created *new* benefits and obligations . . . .") (emphasis added); *Or. Natural Desert Ass'n*, 465 F.3d at 985 n.10 (recognizing "substantive legal constraints imposed" by the challenged agency action); *Alaska I*, 244 F.3d at 750 (explaining that the parties bringing suit "would be subject to criminal and civil penalties for the violation of [the agency's orders], *as well as* for the violation of the" Clean Air Act itself) (emphasis added).

does not contain those waters, then the CWA does not require Fairbanks to acquire that permit. In either case, Fairbanks' legal obligations arise directly and solely from the CWA, and not from the Corps' issuance of an approved jurisdictional determination. *See Gallo Cattle Co. v. USDA*, 159 F.3d 1194, 1199 (9th Cir. 1998) (agency decision not final agency action because potential legal consequences flowed only from the plaintiff's "disregard of its statutory obligation"). Whether Fairbanks' property is a jurisdictional wetland (i.e., contains waters of the United States) depends on its "vegetation, soil and hydrology"—the land is what and where it is. The Corps does not alter that physical reality or the legal standards used to assess that reality simply by opining that a particular site contains waters of the United States. *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 16 (D.C. Cir. 2005) (agency action that "left the world just as it found it . . . cannot be fairly described as implementing, interpreting, or prescribing law or policy") (internal quotation marks omitted).

In withholding judicial review of the Corps' approved jurisdictional determination, we do not impair Fairbanks' ability to contest the existence of CWA regulatory jurisdiction. *See Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 647 (9th Cir. 2005); *see also Nat'l Ass'n of Home Builders*, 415 F.3d at 15. It is settled law that the federal courts have the final say on the scope of the CWA.[9] In exercising that authority, we would not give

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[9] *See, e.g., Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1153 (9th Cir.2005) (reviewing CWA regulatory jurisdiction in context of challenge to discharge permit's

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the government's position that CWA regulatory jurisdiction exists any particular deference simply because the Corps' views on the matter were formulated in the context of an approved jurisdictional determination rather than, for example, a permit application or enforcement proceeding.

Despite all this, Fairbanks urges that the Corps' approved jurisdictional determination has three legal consequences: it prevents Fairbanks from claiming in mitigation that it had acted with good faith; it effectively requires Fairbanks to submit to the CWA's permitting regime before proceeding with construction; and it deprives Fairbanks of a "negative" jurisdictional determination, which might have been relied upon as a defense to enforcement action.[10] We do not consider

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[9] (...continued)
mitigation requirements); *United States v. Phillips*, 367 F.3d 846, 854-55 (9th Cir. 2004) (reviewing CWA regulatory jurisdiction in context of motion to dismiss indictment); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (reviewing CWA regulatory jurisdiction in context of citizen suit).

[10] Fairbanks also contends that an approved jurisdictional determination is judicially reviewable like an interpretive rule that has a "substantial impact on the rights of individuals," *Am. Postal Workers Union v. U.S. Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983), or the denial of a permit authorizing an otherwise proscribed activity, *John Doe, Inc. v. DEA*, 484 F.3d 561, 566-67 (D.C. Cir. 2007). These arguments assume the desired conclusion: such agency actions are judicially reviewable only insofar as they have tangible legal consequences or otherwise alter the legal relationship between the parties. *See Oregon v. Ashcroft*, 368 F.3d 1118, 1120 (9th Cir. 2004) (holding that interpretive rule "is a final determination for jurisdictional purposes because the rule impos[es] obligations and sanctions in the event of violation [of its provisions]") (internal quotation marks omitted and alteration in original). By contrast, the Corps' approved jurisdictional (continued...)

these arguments persuasive and shall address each in turn.

[7] "In determining the amount of a civil penalty the court shall consider . . . any good-faith efforts to comply with the applicable requirements [of the CWA] . . . ." 33 U.S.C. § 1319(d) (emphasis added). As even the Corps recognizes, an approved jurisdictional determination could "eventually be evidence on the issue of whether a particular course of conduct was undertaken in good or bad faith." But the possibility that Fairbanks might someday face a greater risk of increased fines should it proceed without regard to the Corps' assertion of jurisdiction does not constitute a legal consequence of the approved jurisdictional determination. *Cf. City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) ("Because the FERC orders attach *legal* consequences to the future . . . proceedings, they satisfy the finality prong of our analysis.") (emphasis added). Section 1319(d) does not mention jurisdictional determinations, much less assign them any particular evidentiary weight; thus, any difficulty Fairbanks might face in establishing good faith flows not from the legal status of the Corps' determination as agency action, but instead from the practical effect of Fairbanks having been placed on notice that construction might require a Section 404 permit. *See Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 811 (D.C. Cir. 2006); *Nat'l Ass'n of Home Builders*, 415 F.3d at 15. The Corps' approved jurisdictional

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[10] (...continued)
determination imposes no new or additional legal obligations on Fairbanks. It at most "simply 'reminds' affected parties of existing duties" imposed by the CWA itself and commands nothing of its own accord. *See Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 n.153 (D.C. Cir. 1979).

determination has no more legal effect on Fairbanks' ability eventually to assert a good faith defense than would, for example, a report by a private wetlands consultant informing Fairbanks that its property contained wetlands.

[8] Fairbanks' second argument, that the Corps' approved jurisdictional determination "as much as requires" and "makes [Fairbanks] subject to the CWA permitting regime, an onerous administrative maze," likewise erroneously conflates a potential practical effect with a legal consequence.[11] We do agree that now that Fairbanks is on the Corps' radar screen, it is at least plausible that the probability of enforcement action if Fairbanks proceeds with construction without

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[11] We appreciate that navigating the CWA permitting process is no small task. *See Rapanos*, 547 U.S. at 721 (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 . . . ."). Yet, we must keep in mind that these are the costs of statutory compliance with the CWA. Whether or not it has an approved jurisdictional determination in hand, the owner of land that contains waters of the United States must bear those costs. Because any legal obligation to undergo the CWA permitting process does not arise from the Corps having expressed its view that Fairbanks' property is a wetland, we do not reach the Corps' argument that agency action requiring a party to participate in further agency proceedings is characteristically non-final. *Compare Hecla Mining Co. v. EPA*, 12 F.3d 164 (9th Cir. 1993) (EPA's decision to list mine as "point source[ ] discharging toxic pollutants that are responsible for impairing the achievement of water quality standards" not final agency action because it "serve[d] only to initiate proceedings" and required no action on mine's part until permitting process complete), *with Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1442–43 (9th Cir. 1984) (EPA's determination that generator's proposed fuel change constituted a "major modification" was final agency action because it required use of more rigorous "major modification" PSD permit review).

securing a Section 404 permit is greater than it was before it requested an approved jurisdictional determination. Not every agency "decision . . . [that] has immediate financial impact," or even "profound [economic] consequences" in the real world, is final agency action, however. *See Indus. Customers of Ne. Util.*, 408 F.3d at 646-47. Whatever Fairbanks now chooses to do, it will be no more or less in violation of the CWA than if it had never requested an approved jurisdictional determination. The approved jurisdictional determination did not augment the Corps' legal authority to pursue enforcement action. To the contrary, Fairbanks' legal obligations—including any obligation to pursue a Section 404 dredge and fill material discharge permit—have always arisen solely on account of the CWA. *See Gallo Cattle*, 159 F.3d at 1199.

[9] Fairbanks' final point is a non sequitur. It contends that because a Corps determination that a property does not contain "waters of the United States" has legal consequences, a Corps determination that a property does contain jurisdictional waters likewise has legal consequences.[12] Implicit in Fairbanks'

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[12] Fairbanks may be correct that an official Corps statement that a property is not a jurisdictional wetland subject to the CWA's permitting requirements could be the basis for an estoppel defense. When an authorized government official tells the defendant that a course of action is legal and the defendant reasonably relies to its detriment on that erroneous representation, then fairness and due process may prohibit the state from punishing the defendant for that unlawful conduct. *See United States v. Brebner*, 951 F.2d 1017, 1024-25 (9th Cir. 1991); *United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987). Courts have recognized that finality can result "if the language of the document is such that private parties can rely on it as a . . .

(continued..)

argument is the dubious premise that if an agency's decisionmaking process has multiple outcomes and any of these outcomes is judicially reviewable, then all of them must be judicially reviewable. We have not been directed to any authority recognizing this as a principle of administrative law. Unsurprisingly so: the law is replete with situations when the availability of judicial review turns on the effect of the agency's particular decision. Agency action that does not cause injury in fact is not judicially reviewable due to lack of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). And agency action that does not "impose an obligation, deny a right, or fix some legal relationship" is not judicially reviewable due to lack of finality. *Ukiah Valley Med. Ctr.*, 911 F.2d at 264. Whether a Corps finding that a property is not subject to regulatory jurisdiction under the CWA would constitute final agency action is beside the point here, where Fairbanks seeks judicial review of a Corps' finding that its property is subject to CWA regulatory jurisdiction. A negative finding would effectively assure Fairbanks that the Corps would not later be able to fault Fairbanks' failure to seek a permit. The affirmative finding simply puts Fairbanks on notice that the Corps believes a permit is necessary if Fairbanks decides to proceed with its project.

CONCLUSION

[10] We do not have jurisdiction to review the Corps' approved jurisdictional determination finding that Fairbanks' property contains wetland subject to CWA regulatory jurisdiction. Although the approved

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[12] (...continued)
safe harbor by which to shape their actions." *Gen. Elec. Co. v. EPA*, 290 F.3d at 383 (internal quotation marks omitted).

jurisdictional determination is the Corps' official, last word about its view of the status of Fairbanks' property, the Corps' view does not impose an obligation, deny a right or fix some legal relationship. Accordingly, it is not final agency action under the APA.

AFFIRMED.

Appendix B–1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

FAIRBANKS NORTH STAR BOROUGH, Plaintiff, vs. UNITED STATES ARMY CORPS OF ENGINEERS; BRIGADIER GENERAL JOHN W. PEABODY, Division Engineer; and COLONEL KEVIN J. WILSON, Commander of the Alaska Engineer District, Defendants.	Case No. 4:06-cv-0026-RRB **ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (DOCKET 16)**

I. INTRODUCTION

At Docket 16 are Defendants United States Army Corps of Engineers, *et al.* (hereinafter collectively referred to as the "Corps"), with a Motion for Judgment on the Pleadings.[1] In essence, the Corps argues the

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[1] The Corps' motion is brought pursuant to Fed. R. Civ. P. 12(c), which provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one far

(continued...)

instant matter should be dismissed because the Court lacks the requisite subject matter jurisdiction necessary to hear the same.[2] More specifically, the Corps contends: (1) the regulatory jurisdictional determination at issue is *not* a "final agency action" subject to review under the Administrative Procedure Act ("APA"); (2) the matter is not ripe; (3) the Clean Water Act ("CWA") precludes judicial review of the regulatory jurisdictional determination; (4) Plaintiff Fairbanks North Star Borough ("North Star") lacks Article III standing to challenge Special Public Notice 2003-5; and/or (5) North Star lacks Article III standing to challenge the Corps' regulatory jurisdictional determination, which it alleges does not determine any rights or obligations, or have any legal consequences.[3] North Star opposes at Docket 21 and contends: (1) the regulatory jurisdictional determination constitutes "final agency action"; (2) the jurisdictional determination is ripe for judicial review; (3) the CWA does not preclude review of the jurisdictional determination; and (4) North Star has Article III

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[1] (...continued)
summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[2] Docket 17 at 2.

[3] *Id.* at 2-3.

standing to challenge the jurisdictional determination.[4] The Court disagrees.[5]

II. FACTS

"The property at issue in this case comprises 2.1 acres which [North Star] wishes to develop into playgrounds, athletic fields, restrooms, concession, and related structures."[6]

> On October 26, 2005, North Star requested that the Corps make a jurisdictional determination of the property.[7] On November 3, 2005, the Corps issued a preliminary jurisdictional determination

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[4] Docket 21 at 1. Inasmuch as the parties agree North Star lacks Article III standing to challenge Special Public Notice 2003-05, which the Corps rescinded five months before [North Star] filed its Complaint, *see* Docket 24 at 2 n.1, North Star's challenge to Special Public Notice 2003-05 is hereby **DISMISSED** as moot. *See also* Docket 21 at 2 n.1.

[5] Inasmuch as the Court concludes the parties have submitted memoranda thoroughly discussing the law and evidence in support of their positions, it further concludes oral argument is neither necessary nor warranted with regard to the instant matter. *See Mahon v. Credit Bureau of Placer County Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999) (explaining that if the parties provided the district court with complete memoranda of the law and evidence in support of their positions, ordinarily oral argument would not be required). For this reason, North Star's Request for Oral Argument at **Docket 25** was **DENIED**. *See* Docket 26.

[6] Docket 21 at 3.

[7] "When requested, the Corps can make a jurisdictional determination to decide whether a putative 'water of the United States' is within its regulatory jurisdiction under the CWA and thus whether a permit is even necessary." Docket 17 at 5 (citing 33 C.F.R. §§ 320.1(a)(6), 325.9).

> concluding that the property contains "waters of the United States" subject to the Corps' jurisdiction under the CWA.[8]

North Star subsequently requested a final determination. "On December 13, 2005, the Corps issued a positive final jurisdictional determination, finding that [North Star's] entire parcel contains waters of the Untied States."[9]

> On February 8, 2006, North Star filed an administrative appeal of the jurisdictional determination. On May 25, 2006, the Corps found that the appeal did not have merit.[10] To date, North Star has never applied for a permit from the Corps to conduct activities on the property. In addition, the United States has not initiated any action to enforce the CWA on the property.[11]

III. STANDARD OF REVIEW

A party is entitled to judgment on the pleadings pursuant to Rule 12(c) when "taking all allegations in the pleading as true, the moving party is entitled to

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[8] Docket 17 at 6 (citations omitted).

[9] Docket 21 at 3-4 (citation omitted).

[10] "On May 26, 2006, the Corps's [sic] then appellate officer, Brigadier General John W. Peabody, denied the appeal and upheld the Corps's [sic] jurisdictional determination." *Id.* at 4 (citation omitted).

[11] Docket 17 at 6 (citations omitted).

judgment as a matter of law."[12] The court views the alleged facts and all inferences in the light most favorable to the nonmoving party.[13] If allegations conflict, the court accepts the nonmoving party's allegations as true.[14] The moving party must establish beyond doubt that the nonmoving party can establish no set of facts supporting its claim before the court may grant a Rule 12(c) motion.[15]

IV. DISCUSSION

A. The jurisdictional determination does not constitute final agency action.

"The APA limits judicial review to 'final agency action.'"[16] In *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997),

> [T]he Supreme Court found that two conditions must be satisfied for agency action to be final: (1) "the action must mark the 'consummation' of the agency's decision making process"; and (2) "the action must be one by which 'rights or obligations have been

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[12] *McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996), *cert. denied*, 520 U.S. 1181, 117 S. Ct. 1460 (1997). *See also Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003) ("A motion for judgment on the pleadings should be granted where it appears the moving party is entitled to judgment as a matter of law.").

[13] 5C Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1368 (3d ed. 2004).

[14] *Id.*

[15] *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997).

[16] Docket 17 at 10 (citations omitted).

> determined' or from which 'legal consequences will flow.'"[17]

The jurisdictional determination at issue merely informed North Star where it stood with respect to potential permitting issues. As a result, the Court concludes it "did not mark the consummation of the Corps' decision making process."[18] Moreover, it did not affect the legal rights and/or obligations of the parties. Indeed, "the legal rights and/or obligations of the parties were precisely the same the day after the jurisdictional determination was issued as they were the day before."[19] Consequently, the Court further concludes the "jurisdictional determination is not a final agency action subject to APA review."[20] For similar reasons, the matter is not ripe.

B. The jurisdictional determination is not ripe for judicial review.

Interpreting its own rules and regulations, the Corps has declared,

> In the past, a number of courts have held that jurisdictional determinations are not ripe for review until a landowner who disagrees with a [jurisdictional determination] has gone through the permitting process. The Federal

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[17] *St. Andrews Park, Inc. v. U.S. Dept. of Army Corps of Engineers*, 314 F. Supp. 2d 1238 (S.D. Fla. 2004).

[18] Docket 17 at 11.

[19] *St. Andrews Park*, 314 F. Supp. 2d at 1245 (citation omitted).

[20] Docket 17 at 10 (citations omitted) (emphasis added).

> Government believes this is the correct result . . . .[21]

The Corps further rationalized:

> Physical circumstances can change over time, and the scope of regulatory jurisdiction when a [jurisdictional determination] is initially performed might be different from the scope of jurisdiction when a permit application is reviewed or when an enforcement action is taken.

As a result, and because the Court "owes substantial deference to an agency's reading of its own regulations,"[22] North Star's challenge to the jurisdictional determination is not ripe.[23] "Furthermore, even if the jurisdictional determination were a final agency action and ripe for review, the APA's waiver of sovereign immunity does not apply when 'statutes preclude judicial review.'"[24]

C. The CWA precludes review of all pre-enforcement agency actions, including jurisdictional determinations.

Indeed, the Corps "initial determination that it has authority to either require permitting[,] or issue

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[21] 65 Fed. Reg. at 16488 (March 28, 2000).

[22] *Zurich American Ins. Co. v. Whittier Properties, Inc.*, 356 F.3d 1132, 1137 (9th 2004).

[23] "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Docket 17 at 14 (quoting *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (citation omitted)).

[24] Docket 17 at 15 (citing 5 U.S.C. § 701(a)(1)).

orders in the absence of a permit application[, are] unreviewable."[25]

V. CONCLUSION

For these reasons, and for additional reasons more clearly articulated within the relevant pleadings,[26] the Corps' Motion for Judgment on the Pleadings at **Docket 16** is hereby **GRANTED**. Notwithstanding, inasmuch as nothing determined herein prevents North Star from refiling once final agency action has been taken and all administrative remedies have been exhausted, the matter is **DISMISSED WITHOUT PREJUDICE**.

ENTERED this 18th day of May, 2007.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

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[25] Docket 24 at 14 (quoting *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir. 1993) (quoting *Rueth Development Co., Inc. v. U.S. E.P.A.*, 1992 WL 560944, at *2 (N.D. Ind. 1992)); and citing *Child v. U.S.*, 851 F. Supp. 1527, 1533 (D. Utah 1994) (holding that plaintiff had no right to pre-enforcement review of jurisdictional determination by the Corps)). Although not authoritative, the Court finds these cases to be particularly persuasive. *See also Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers*, 425 F.3d 1150, 1153 (9th Cir. 2005) ("[Plaintiff] signed the permit, [thus] preserving the right to seek judicial review of the Corps' jurisdictional determination").

[26] For example, the Corps argument regarding the *Leedom* doctrine is particularly persuasive. As a result, the Court finds that the "severely limited circumstances" necessary to invoke the *Leedom* doctrine are not present in the instant matter. *See Leedom v. Kyne*, 358 U.S. 184 (1958); and *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 42-44 (1991).

Appendix C–1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FAIRBANKS NORTH STAR BOROUGH, Plaintiff - Appellant, v. U.S. ARMY CORPS OF ENGINEERS; JOHN W. PEABODY; KEVIN J. WILSON, Defendants - Appellees.	No. 07-35545 D.C. No. CV-6-0026-F-RRB ORDER FILED Nov. 20, 2008

Before: D. NELSON, TASHIMA and FISHER, Circuit Judges.

Judge Fisher has voted to deny the petition for rehearing en banc, and Judges D. Nelson and Tashima so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed October 23, 2008, is **DENIED**.